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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Appellant,

v.

JOHAN GOMEZ,

Defendant and Respondent.

B213960

(Los Angeles County
Super. Ct. No. NA079517)

APPEAL from orders of the Superior Court of Los Angeles County.

James B. Pierce, Judge. Reversed and remanded.

Steve Cooley, District Attorney, Phyllis C. Asayama and Susan K. Dozier, Deputy District Attorneys, for Plaintiff and Appellant.

Michael P. Judge, Public Defender, Albert J. Menaster and Robert Hill, Deputy Public Defenders, for Defendant and Respondent.

The Los Angeles County District Attorney charged Johan Gomez with possession of a firearm and ammunition by a felon (Pen. Code, §§ 12021, subd. (a)(1), 12316, subd. (b)(1)).¹ The information further alleged that defendant had suffered prior convictions for grand theft (§ 487, subd. (c)) and possession of ammunition by a felon (§ 12316, subd. (b)(1)).

Gomez moved to suppress the recovered firearm (a shotgun) and ammunition pursuant to section 1538.5.² At the hearing on the suppression motion, one of the arresting officers testified to the circumstances surrounding the recovery of the shotgun and ammunition. Gomez did not call any witnesses. At the conclusion of the hearing, the trial court granted the suppression motion. The People indicated they were unable to proceed without evidence of the shotgun and ammunition, and the trial court accordingly dismissed the charges against Gomez pursuant to section 1385.³ The People timely appealed from the dismissal.

On appeal, the People contend that the trial court committed reversible error by granting Gomez's suppression motion. We agree, and reverse the trial court's ruling.

BACKGROUND

On September 1, 2008, Long Beach Police Department Officer Ricardo Solorio and his partner, Officer Marquez, were patrolling the intersection of 16th Street and Elm Avenue, an area claimed by the Barrio Pobre gang. At 8:59 p.m., Officer Solorio

¹ All further statutory references are to the Penal Code unless otherwise specified.

² Section 1538.5 provides in relevant part: “(a)(1) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds: [¶] (A) The search or seizure without a warrant was unreasonable.”

³ Section 1385 provides in relevant part: “(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.”

observed Gomez drinking from a beer can as Gomez was walking along 16th Street.⁴ Officer Solorio directed Gomez to place the beer can on the ground and he escorted Gomez to the front of the patrol vehicle. Officer Solorio saw that Gomez had the letters “H-A” tattooed on his left arm and the letters “L-B” tattooed on his right arm. According to Officer Solorio, “most Hispanic gang members” have tattoos with the letters “H-A.”

After Gomez provided Officer Solorio with his full name and date of birth, Officer Solorio ran Gomez’s information through the department’s computer system and learned that Gomez was on active parole for vehicle theft, and that he was a documented member of the Barrio Pobre gang. Upon learning this information, Officer Marquez conducted a parole search of Gomez’s person and found a key chain with a car key and alarm remote inside one of his pockets. The officers asked Gomez why he was in the area and how he arrived there, and Gomez replied that he had attended a baptism and that a friend had dropped him off. When asked by the officers where the baptism was located, Gomez pointed in a westerly direction.

The officers asked Gomez about the location of the vehicle that corresponded with the key found in his pocket. Gomez told the officers that the vehicle belonged to his girlfriend and that his girlfriend was in possession of the vehicle at the time. The officers asked Gomez whether the vehicle was parked in the area. Defendant answered in the negative and again stated that the vehicle was with his girlfriend. According to Officer Solorio, during their questioning about the vehicle’s whereabouts, Gomez appeared nervous and was stuttering, sweating, and looking around as he spoke.

Based on Gomez’s gang affiliation and nervous appearance, Officer Solorio suspected that Gomez was lying about the vehicle’s whereabouts, that the vehicle was actually in the nearby vicinity, and that there was contraband inside the vehicle. At this

⁴ At the time, Gomez was walking with another individual. Officer Solorio recognized this other individual as a member of the Barrio Pobre gang who went by the moniker “Chato.” The record is silent as to what happened to Chato during and after Gomez’s detention.

point, the officers arrested Gomez for drinking alcohol in public.⁵ They handcuffed him and placed him in the back of the police vehicle. Approximately five minutes had elapsed between the time the officers first spotted Gomez with the open beer can and when they arrested him.

Once Gomez was arrested, the officers wanted to “confirm his story” so they drove to the area of 16th Street and Locust Avenue, where Gomez had indicated the baptism had taken place, in order for Gomez to identify the exact location of the baptism. Officer Solorio explained that he wanted to confirm Gomez’s story to “know more about the overall situation” given Gomez’s “nervous” demeanor. The area of 16th Street and Locust Avenue was also in the direction of the downtown police station.

While the officers were driving to the location of the baptism, Gomez told the officers that they could contact his girlfriend to confirm that the vehicle in question was in her possession. Officer Marquez, using Gomez’s cell phone, called Gomez’s girlfriend. The girlfriend answered and told Officer Marquez that the vehicle in question was a Dodge Caravan and that Gomez was in possession of the vehicle. The officers had been driving for five to 10 minutes at this point. After learning from the girlfriend that Gomez was in possession of the vehicle, the officers abandoned their effort to look for the baptism and instead started driving directly toward the police station. As they were making their way to the police station, Officer Solorio began pushing the buttons on the alarm remote to see if any vehicle would respond as they drove by. Officer Solorio explained that given the conflict between the statements of Gomez and his girlfriend, he wanted to locate the vehicle because he suspected that Gomez was hiding contraband in the vehicle. On the 500 block of East New York Street, a street that was en route to the police station, the lights on a gray Dodge Caravan illuminated at the same time Officer

⁵ Long Beach Municipal Code section 9.22.010 provides: “No person shall transport into or drink or consume any alcoholic beverage in any public place except upon the premises licensed under an on-sale or on-sale general license under the State Alcoholic Beverage Control Act.”

Solorio activated the alarm remote. Officer Solorio estimated that he had been pushing the buttons on the alarm remote for just two minutes before he located the Dodge Caravan.

Officer Solorio got out of the police vehicle and approached the Dodge Caravan, which was parked on a public roadway. He illuminated the interior of the van with a flashlight through the driver's side window and saw the handle of a shotgun on the floorboard between the center console and the driver's seat. Officer Solorio went around to the passenger window and confirmed that what he saw was indeed the handle of a shotgun. Officer Solorio unlocked the vehicle with the alarm remote and recovered the shotgun. Officer Solorio also recovered a live round inside the shotgun, and found a shotgun shell and a pair of black gloves next to the shotgun.

After securing the shotgun, the officers called Gomez's girlfriend again. She told the officers that Gomez had purchased the vehicle one to two weeks ago from a person named "Christina." The officers found paperwork in the car with Christina's contact information. They spoke with Christina and Christina confirmed that she had sold the vehicle to Gomez but that the transfer of title had not yet been recorded by the DMV.

The officers waited with Gomez until the vehicle was towed, which occurred at 10:02 p.m. The officers then drove Gomez to the police station where he was booked.

DISCUSSION

I. Overview

On appeal, the People argue the officers had a right to conduct a warrantless search for Gomez's van because: (1) Gomez was on parole and the search was not arbitrary, capricious, or harassing, and (2) locating the van through activation of the alarm remote was a reasonable search method under the Fourth Amendment.

Gomez correctly points out that the second argument was not raised below and thus urges us not to consider it on appeal. (*People v. Watkins* (1994) 26 Cal.App.4th 19, 30 ["Ordinarily, the prosecution cannot justify a search or seizure on appeal on a theory that was not presented to the trial court [T]he rule does not apply 'where there does

not appear to be any further evidence that could have been introduced to defeat the theory in the trial court and therefore the question of application of the new ground to a given set of facts is a question of law”].)

We need not decide whether the People forfeited the second argument because we agree with the People’s first argument that the parole exception to warrantless searches applied in this case and the officers’ search for the vehicle was not arbitrary, capricious, or harassing.

II. Proceedings Below

At the suppression motion, Gomez conceded that the officers had a right to search his person. He argued, however, that once the officers found “nothing giving rise to criminality” on his person, they had no right to take further steps to search for his vehicle. According to Gomez, “there was nothing particularized about [him] that made this anything more than an arbitrary and capricious search because there’s nothing he said, nothing he had on him, that made—that could have made these officers have anything more than a hunch as to what they [would] find.” The prosecution responded that the officers had a right to conduct a “suspicionless search” for and of Gomez’s vehicle because he was on parole and that, in any event, there was suspicion of criminality in this case because Gomez had lied about whether he was in possession of the vehicle and his overall demeanor appeared evasive and nervous.

In response to the prosecution’s argument, the trial court stated “there’s got to be some nexus” between Gomez’s conduct of “walking down a street with an open container” and the search for his vehicle. The court reasoned that “as long as [the search] has something to do with that open container and as long as it has something to do with that individual and that open container,” then the search is reasonable under the Fourth Amendment. An officer, according to the trial court, is required to “have a very strong suspicion, not just a hunch, that there’s going to be something illegal” before conducting a search beyond the parolee’s person. The trial court went on to state that because the

officers searched for Gomez's vehicle based on a "hunch" and "whim," the officers' conduct "crossed [the] line" and became an arbitrary and capricious search.

III. Relevant Authority

On appellate review, factual findings of lower courts are upheld if supported by substantial evidence. But when reviewing questions of law, such as whether a search or seizure was reasonable, we exercise independent judgment. (*People v. Camacho* (2000) 23 Cal.4th 824, 830.)

The absence of a warrant or a particularized suspicion for a parole search does not run afoul of privacy interests under the Fourth Amendment, since a parolee lacks a legitimate expectation of privacy, and the state has a substantial interest in supervising parolees and reducing recidivism. (*Samson v. California* (2006) 547 U.S. 843, 852-853, 857.) Section 3067, subdivision (a), provides that all parolees from state prison are subject to "search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." This statutory provision is constitutional and it gives law enforcement the authority to search the parolee, his residence, and any property under his control, including his vehicle. (*Samson, supra*, at p. 857; *People v. Sardinas* (2009) 170 Cal.App.4th 488, 492-493; see Cal. Code Regs., tit. 15, § 2511, subd. (b)(4) [notice of parole conditions include: "Search. You and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer"].) Thus, when a law enforcement officer knows that the defendant is on parole and subject to a search condition, the search is reasonable and does not violate any expectation of privacy, even in the absence of a particularized suspicion of criminal activity. (*People v. Sanders* (2003) 31 Cal.4th 318, 333; see also *People v. Hunter* (2006) 140 Cal.App.4th 1147, 1152.)

However, "'a parole search could become constitutionally 'unreasonable' if made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer.'" [Citations.]"

(*People v. Reyes* (1998) 19 Cal.4th 743, 753-754 (*Reyes*)). “[A] search is arbitrary and capricious when the motivation for the search is unrelated to rehabilitative, reformatory or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee.” (*Id.* at p. 754.) Likewise, “an unrestricted search of a probationer or parolee at [an officer’s] whim or caprice is a form of harassment” that amounts to an unreasonable search. (*Ibid.*, citing *People v. Bremmer* (1973) 30 Cal.App.3d 1058, 1065.)

IV. Motion Improperly Granted

At the outset, we note it is undisputed that Officer Solorio verified that Gomez was a parolee before searching his person. Thus, as a parolee, Gomez had a greatly diminished expectation of privacy and understood that as a condition of his parole, law enforcement had the authority to search the parolee, his residence, and any property under his control, including his vehicle. (*Samson v. California*, *supra*, 547 U.S. at p. 857; *Reyes*, *supra*, 19 Cal.4th at p. 754.)

In our view, the search for Gomez’s van was not constitutionally unreasonable under *Reyes*. First, the search was not unreasonably prolonged or oppressive. Officer Solorio testified that he activated the alarm remote *while* en route to the police station and only for two minutes before locating the van. Furthermore, the search for the vehicle, which occurred sometime before 10:02 p.m., did not occur at an unreasonable hour in the evening. Nor was there any evidence that the search for the vehicle was motivated by personal animosity toward Gomez, or that the officers had conducted the same search at some prior time. Finally, there was no evidence that the officers’ actions of searching for the vehicle were based on whim or caprice. Officer Solorio testified that he wanted to locate the vehicle because he suspected it carried contraband. His suspicions arose after Gomez and his girlfriend gave conflicting versions of who was in possession of the vehicle, and Gomez appeared nervous and evasive. Thus, the officer’s motivations were related to “legitimate law enforcement purposes” (*Reyes*, *supra*, 19 Cal.4th at p. 754.) Once the vehicle was located and Officer Solorio saw the handle of a firearm on

the floor of the vehicle in plain view, he was undoubtedly justified in unlocking the vehicle to secure the weapon. (§12031, subd. (e) [“In order to determine whether or not a firearm is loaded . . . peace officers are authorized to examine any firearm carried by anyone on his or her person or in a vehicle while in any public place or on any public street”].)

Gomez contends the trial court “found, as a pure matter of fact, that the officers acted in bad faith or with improper motivations or otherwise harassingly and arbitrarily” and that we must affirm the trial court’s ruling so long as there is substantial evidence supporting the ostensible finding of bad faith. We have thoroughly reviewed the record and conclude that the trial court did *not* make a factual finding that the police officers acted in bad faith or engaged in other improper conduct. The trial court’s decision was based on its mistaken legal conclusion that the Fourth Amendment required some “nexus” between the criminal conduct Gomez was initially arrested for and the subsequent search for his vehicle, and that the officers needed “a very strong suspicion” of illegality. While it is certainly true, as Gomez points out, that an appellate court will uphold a correct ruling by the trial court under any theory applicable to the case, the ruling in this case was simply incorrect and based on an improper understanding of the law.

We conclude the officers’ search for the van was proper under the totality of the circumstances in this case, and that the trial court improperly granted the suppression motion.⁶

⁶ Citing several cases from the Ninth Circuit Court of Appeals (e.g., *U.S. v. Grandstaff* (9th Cir. 1987) 813 F.2d 1353 and *U.S. v. Portillo-Reyes* (9th Cir. 1975) 529 F.2d 844), the People argue that activating an alarm remote “does not constitute a search within the meaning of the Fourth Amendment.” Gomez responds that because “the officers’ activation for the remote control key was, from the first, ‘the beginning of the search’ [citation], with each activation indivisibly enabling and leading to the seizure of the evidence which the superior court order[ed] suppressed.” We need not wade into the area of whether activation of a car alarm remote is a “search” because our analysis

DISPOSITION

We reverse the orders granting the motion to suppress evidence and dismissing the charges against Gomez. We remand for further trial proceedings.

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_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
ASHMANN-GERST

assumes, without deciding, that activating a car alarm remote is a search but that it was not unreasonable under the circumstances of this particular case.